§ 716; *Howard* v. *Daly*, supra. A rule, still more severe upon the defendant, was employed in a recent case in Louisiana, *Thurmond* v. *Skannal* (1907) 42 So. 577, where the court awarded damages, as of course, to the amount of the full contract wages for the whole term. Both of these methods seem to be exceptions to the general rule of contract damages. It is not made clear in any of the cases why the plaintiff is not in the first place required to prove his damages, as in other contracts, *Ridgley* v. *Mooney* (Ind. 1896) 45 N. E. 348; *Tufts* v. *Bennet* (1895) 163 Mass. 398; and why in this branch of contracts the measure of damages should not also be the difference between the market price and the contract price where there is a market price, and, where there is no market or only a market for part of the plaintiff's time, why the plaintiff should not be compelled to show this fact. As Erle, J., said in *Beckman* v. *Drake* (1849) 2 H. of L. Cas. 578, 606, there is generally a market for labor where the usual rate of wages for a given kind of labor may be proved, and the plaintiff's indemnity for the loss of his bargain in respect of his labor should be settled on the same principles as for the loss of a bargain in respect of common merchandise. It is believed that, whether a servant after dismissal works or is idle, the measure of his damages should be the difference between the market and contract price of his labor, and it would, therefore, follow that the burden of proof of the market price should be upon the plaintiff as the very basis of his claim for anything more than nominal damages, and should not be, as is now generally held, upon the defendant as part of his proof of the plaintiff's failure to perform his supposed duty of reducing damages by seeking other employment. The only duty to reduce damages which might be incumbent upon the plaintiff would be that suggested in *Frost* v. *Knight*, supra, namely, to take advantage of circumstances which might mitigate his losses, that is, which might make his damages less than the difference between the contract and market prices. The scope of that duty is not very clear; but of course it has nothing to do with the establishment of the market price itself. The principal case is, therefore, clearly wrong under the general principles of contracts; and, as to the amount of damages, it is also against the overwhelming weight of authority. Sedgwick, Damages, 8th Ed., § 665; Smith, Master and Servant, 160; *Beckman* v. *Drake*, supra; *Emmens* v. *Elderton*, supra; *Howard* v. *Daly*, supra.

LIMITATIONS OF POWERS IN TRUST IN NEW YORK.—"There are not only a mere trust and a mere power, but there is also known to the court a power which the party to whom it is given is intrusted and required to execute." *Brown* v. *Higgs* (1803) 8 Ves. 561. The doctrine thus enunciated by Lord Eldon has proved very serviceable to the revisers of the New York system of trusts and powers; Chaplin, Express Trusts, 427 et seq.; Real Prop. Law §§ 79, 110 to 162; and the retention of powers in trust has rendered the general system of disposition of property interests more flexible. Real Prop. Law, § 79; *Downing* v. *Marshall* (1861) 23 N. Y. 366; *Reynolds* v. *Denslow* (1894) 80 Hun 359. Many principles of the common law relating to powers are embodied in the statutes, and must be resorted to for their interpretation. *Mutual Life Insurance Co.* v. *Shipman* (1890) 119 N. Y. 324, 329; *Barber* v. *Cary* (1854) 11 N. Y.

397. Thus the settled distinction between trusts proper and powers in trust, that in the former the legal title vests in the trustee, in the latter in the devisee or other beneficiary, subject to the execution of the power, still prevails. *Manice* v. *Manice* (1871) 43 N. Y. 303; *Post* v. *Hover* (1865) 33 N. Y. 593; Fowler, Real Prop. Law, 368. The scope of powers in trust has, however, been enormously extended and their creation stimulated, by the policy of the statute which limits the purposes for which active express trusts may be created to the five well known groups, Real Prop. Law, § § 76, 93, and permits every other attempted active express trust, if lawful as a power in trust, to operate only as such. Real Prop. Law § 79; *Manice* v. *Manice*, supra; *Reynolds* v. *Denslow*, supra. And the disposition of the courts has been to construe the enumerated classes strictly, so that every ambiguous devise takes effect, not as a trust, but as a power. *Matter of Conger* (1903) 81 App. Div. 493, 499; *Heermans* v. *Robertson* (1876) 64 N. Y. 332, 343; cf. *Murray* v. *Miller* (1904) 178 N. Y. 316. The limitations of the purposes for which powers in trust may lawfully be created have not been completely developed, due partly to the absence of positive statutory provisions, Fowler, Real Prop. Law, 405, and partly, no doubt, to the indefinite nature of this species of interest. From time to time, however, the courts have set certain bounds to the purposes which will ground a valid power in trust; and in this respect the Revised Statutes subjected the previously existing law to no innovation. *Downing* v. *Marshall*, supra, 379. The fundamental principle seems to be that since a "power in trust involves the idea of a trust as much as a trust estate," *Farmers' etc. Co.* v. *Carroll* (1849) 5 Barb. 613; see *Godolphin* v. *Godolphin* (1747) 1 Ves. Ch. Rep., any purpose for which an active express trust might have been created at common law [even semble, the statutory groups, *Reynolds* v. *Denslow*, supra; *Tucker* v. *Tucker* (1851) 5 N. Y. 408; contra, *Gann* v. *McCunn* (1879) 56 How. Prac. 337, dictum] will serve as well for a trust power. *Holly* v. *Hirsch* (1892) 135 N. Y. 590; *Townshend* v. *Frommer* (1891) 125 N. Y. 446. Accordingly, powers in trust have been held void where there was no appointee; *Farmers' etc. Co.* v. *Carroll*, supra; where the purpose of the power was so indefinite as to be unascertainable; *Read* v. *Williams* (1891) 125 N. Y. 560; *Clapp* v. *Byrnes* (1896) 3 App. Div. 284; where no specific duty was imposed upon the donee; *Aldrich* v. *Funk* (1888) 48 Hun. 367; where, although the power was imperative, no beneficiary was in a position to enforce its execution; *Tilden* v. *Green* (1891) 130 N. Y. 29; or where the execution of the power would contravene public policy; for example, the policy of the Rule against Perpetuities. *Booth* v. *Baptist Church* (1891) 126 N. Y. 215; *Garvey* v. *McDevitt* (1878) 72 N.Y. 556; *Downing* v. *Marshall*, supra, 388; *Belmont* v. *O'Brien* (1855) 12 N. Y. 394.

Powers in trust have proved very useful in effectuating the intentions of testators and in upholding devises which otherwise would be invalid. This is illustrated in those cases where the courts have construed a devise as creating a valid power in trust rather than an invalid trust. 7 COLUMBIA LAW REVIEW, 73. An analogous result was reached in a recent New York case, *Kellogg* v. *Burdick* (1907) 80 N. E. 207, where a testator, apparently oblivious of the statute constituting a wife joint guardian with her husband of the person and property of their minor

children, and restricting to the surviving parent the right to appoint a testamentary guardian, Domestic Rel. Law, § 51, attempted in express terms to appoint his executors guardians of the property he devised to his minor children, although his wife was still alive. The appointment as such being concededly void because in violation of the statute, the Court of Appeals, E. T. Bartlett and Werner, JJ., dissenting, sustained it as creating a power in trust vesting the executors with authority such as a guardian of the property would have. Since no particular form of words is necessary to create a power in trust, *Blanchard* v. *Blanchard* (1875) 4 Hun 287; s. c. 70 N. Y. 615; 1 Sugden, Powers, 115, and since "the creation, execution and destruction of powers all depend upon the substantial intention of the parties; and they are construed equitably and liberally in furtherance of that intention," 4 Kent, Com. * 129; *Dorland* v. *Dorland*, and since in the principal case the latter result was reached, the decision seems sound, unless it violates the policy of the statute. *Prima facie*, it might appear that the legislative intent was to prevent a testator in all cases from depriving his wife of the control and management of her children's property during their minority, but this view is untenable, for the statutes allow the testator to accomplish this very result by the creation of a trust. The principal case, moreover, finds a strong support in the leading case of *Post* v. *Hover*, supra, where a similar result was reached. It hardly seems as if the doctrine of this case should be overthrown by a statute of such doubtful meaning, taking into account the importance of trust powers at the time the statute was passed. *Grimsley* v. *Grimsley* (1887) 79 Ga. 397; *Matter of Lichstenstadter* (N. Y. 1886) 5 Dem. 214; contra, *Brigham* v. *Wheeler* (1844) 8 Met. 127.

THE NATURE OF THE RIGHT TO WHARF OUT INTO NAVIGABLE WATERS. —The New York Court of Appeals in a recent case decided that a littoral owner's right of access comprehends "necessarily and justly, whatever is needed for the complete and innocent enjoyment of that right," and that the erection of a wharf from high water mark out to the line of navigability was thus a legal enjoyment of that right of access, although the fee to the submerged land was not in the littoral owner but in the sovereign. *Trustees of the Town of Brookhaven* v. *Smith* (1907) 36 N. Y. L. Jour. No. 145. The early case of *Gould* v. *Hudson River R. R.* (1852) 6 N. Y. 522, declared that a riparian owner on the Hudson River had no private right of access by virtue of his ownership, but had merely the rights of any member of the public in the waters and foreshore. This decision was frequently criticized, *Kane* v. *N. Y. Elev. R. R.* (1891) 125 N. Y. 164, 184, and was finally overruled, *Rumsey* v. *N. Y. & N. E. R. R.* (1892) 133 N. Y. 79, and it is now well settled in New York that the riparian owner on navigable waters has a right of access, which right is property and cannot be injured or taken away without compensation. *Saunders* v. *N. Y. C. & H. R. R. R. Co.* (1894) 144 N. Y. 75; *Thousand Islands Steamboat Co.* v. *Visger* (1904) 179 N. Y. 206. The right itself, however, is definitely qualified. It is expressly subject to the public right of navigation and user of the waters and to the right of the sovereign to make improvements for the benefit of navigation and commerce. *Sage* v. *Mayor* (1897) 154 N. Y. 61; *Rumsey* v. *N. Y. & N. E. R. R.*, supra;